United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

74-1258

To be argued by
RICHARD M. HALL

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1258

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Petitioner,

—v.—

ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

CELANESE CORPORATION, ET AL.,
Intervenors.

BRIEF FOR PETITIONER

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Preliminary Statement

This is an action brought pursuant to §509(b) of the Federal Water Pollution Control Act Amendments of 1972 (the Act)* to obtain judicial review of identical portions of a series of regulations promulgated by the Environmental Protection Agency (EPA). Despite the fact that review is sought of a series of regulations -- nine in the Amended Petition for Review -- there is essentially one issue raised in this proceeding: the legality of the identical paragraph in each.

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* 33 U.S.C. §1369. The Act is set forth at 33 U.S.C. §1251, et seq. Since references in the contested regulations and elsewhere among the administrative record are usually made to the Act rather than the United States Code, references in this brief will be to the Act. Copies of the Act will be submitted with this brief for the convenience of the Court.

The Petition for Review was filed February 22, 1974. An Amended Petition for Review was filed March 28, 1974, adding one more regulation, also containing the contested paragraph, promulgated after the original petition. EPA filed its Supplemental Certified Index to the Record on May 17, 1974.

Statement of the Issues Presented for Review

1. Whether this Court has jurisdiction under §509(b)(1)(E) of the Act over this petition as an action for "[r]eview of the Administrator's action ... in approving or promulgating any effluent limitation or other limitation under section 301 ..."?

2. Whether the effluent limitation promulgated by EPA pursuant to §301 of the Act are by classes and categories so as to provide a uniform, national rule?

Statutes and Regulations Involved

Petitioner respectfully refers the Court to the separately filed Appendix.

Statement of the Case

The Act creates a highly complex statutory and regulatory scheme to control and diminish water pollution. The issues raised by this proceeding are legal -- two related and fundamental questions of first impression as to the structure of the Act. While the administrative record is extensive, because the issues are legal, it will be referred to only occasionally.

A general understanding of the structure and functioning of the Act is helpful in addressing the issues raised.

The Act, which became law on October 20, 1972, over the President's veto, sets forth the national objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." To attain this and interim goals the Act establishes a complex, interrelated legal and administrative scheme.

Section 301(a) of the Act provides the central prohibition

> "Except as in compliance with this section and section 302, 306, 307, 318, 402 and 404 of this Act, the discharge of any pollutant by any person shall be unlawful."

The thrust of this section parallels and as a historical matter arises in substantial part from the Refuse Act of 1899.*

The phrase "discharge of any pollutant" in §301(a) of the Act is a defined phrase. Section 502(12) provides:

> "The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any

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* 33 U.S.C. §407. See, S. Rep. 92-414, 92 Cong., 1st Sess. at 72 (1971) (Legis. Hist. 1490); 118 Cong. Rec. S.18454 (daily ed. 10/17/72) (Legis. Hist. 156).

> pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."

The word "pollutant" used in §301(a) and §502(12) is defined in §502(6); the phrase "navigable waters" is defined in §502(7);* and the phrase "point source" is defined in §502(14). Thus, through this chain of definitions, §301(a) outlaws, unless in compliance with the other sections mentioned, the discharge of pollutants, and extremely broad range of substances, from point sources, a broad category of man-made or man-controlled vehicles or techniques of discharging pollutants, into the bodies of receiving waters to which the statute applies.

The definition of "point source" is important. The complex standards and enforcement scheme of the Act apply to point sources; whereas the frequently serious pollution degrading our waters emanating from non-point sources -- such as generalized runoff of rain from farm land -- is only subject to study and analysis for possible future Congressional action (see, §304(e) of the Act) and long-range land use planning (see §208 of the Act).

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* The identification of the receiving waters is not an issue in this case. It is worth noting that the phrase "navigable waters" is defined much more broadly than traditional concepts of navigability. See U.S. v. Holland, _____ F. Supp. _____, 6 ERC 1388 (M. D. Fla. 1974).

The remaining subsections of §301 and other sections of the Act referred to in §301 contain the central standards and enforcement mechanisms of the Act. It is important to understand that the Act itself does not establish these control standards but calls for the Administrator to establish them through rulemaking following the general directions contained in the Act.

Section 301(b) provides for effluent limitations applicable to all existing point sources based on available pollution control techniques and equipment. Pursuant to §301(b)(1) by July 1, 1977 non-municipal (industrial) point sources must achieve effluent limitations based upon the application of the "best practicable control technology currently available" as defined and identified by the Administrator pursuant to §304 of the Act. Pursuant to §301(b)(2) by July 1, 1983 all non-municipal point sources must achieve effluent limitations based upon the application of "best available technology" as defined by the Administrator pursuant to §304 of the Act. The interpretation of these subsections of §301 and their relation to §304 is at the heart of the dispute to which we will return below.

The use of effluent limitations is a new and important departure from preceding water quality laws which relied on

ambient water quality standards. Ambient water quality standards -- which are still a part, albeit a lesser part, of the Act* -- are standards which speak in terms of the components of the receiving lake or river. For instance, such standards might set a minimum for oxygen (one important measure of the biological health of the water) of 5 milligrams per litre and a maximum for oil or grease of "none visible." Effluent limitations, on the other hand, speak in terms of the components of the particular man-made or man-controlled discharge.

Section 302 of the Act, referred to in §301(a), is the section under which more stringent effluent limitations may be established for a given body of water, if the technology-based effluent limitations of §§301(b) and 306 when applied to all the point sources discharging into that particular body of water are not adequate to attain the prescribed ambient water quality standards.

Section 306 of the Act, referred to in §301(a), provides for the establishment by the Administrator of effluent limitations (in the case of this section referred to as

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*Indeed, it can be stated that effluent limitations are the only true standard. Ambient standards are retained under the Act (§303) essentially as a gauge for measuring success. Ambient standards do not directly affect or control any point source. They only have such an effect through the mechanism of §302 effluent limitations.

"standards of performance") to be imposed on "new sources", a term defined to mean any source the construction of which commences after effluent limitations are established under §306, based upon the application of "the best available demonstrated control technology, process, operating method, or other alternatives, including where practicable, a standard permitting no discharge of pollutants."

Section 307, referred to in §301(a), provides for the last type of effluent limitation. That section provides for the establishment of a list of toxic pollutants, and thereafter effluent limitations for such pollutants, based on toxicity alone, rather than on available control technology or ambient water quality standards. Thus, three of the sections referred to in §301(a) call for the establishment by the Administrator of the principal, substantive standards of the Act -- effluent limitations based on the availability of control technology for existing dischargers of pollutants (§301) and for new sources (§306) and in some instances on ambient water quality standards (§302) and toxicity (§307).

The remaining three sections of the Act, referred to in §301(a) -- §§318, 402 and 404 -- establish the central Congressional strategy for imposing these effluent limitations on individual dischargers and the key to the success of the Act's

enforcement provisions. These sections contain the three permit provisions of the Act.

Section 318 allows the Administrator to permit the discharge of pollutants in controlled circumstances to aid aquaculture, the commercial raising of fish or shellfish. Section 404 allows the Secretary of the Army to issue permits for the deposit in navigable waters of dredge or fill material.

Section 402 establishes the National Pollutant Discharge Elimination System (NPDES), by far the most important of the Act's three permit programs. Section 402(a)(1) provides:

> "Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act."

The NPDES establishes a system whereby the permitting authority translates the applicable effluent limitation be it technology based, ambient water quality standard based or toxic substance based into specific conditions of discharge tailored to the permittee.

Section 402 provides for permitting the "discharge of any pollutant." As set forth above, that phrase is defined

in §502(12) to be the addition of a pollutant from "any point source." Thus, the scope of the NPDES is determined by that central statutory concept of point source and other definitions referred to.

Under the NPDES the federal EPA is the permitting authority. However, if the Administrator determines, under standards established under §402 of the Act as well as implementing regulations, that a state or interstate agency has set up/and can administer an equivalent permit program, he may authorize the participation of the state or interstate agency in the NPDES. In that case, subject to certain federal review and veto powers, the state becomes the permitting authority. Congress anticipated that the states would fairly quickly become the permitting authorities.

Although the existence of uniform, nationwide effluent limitations simplifies and standardizes the individual permit writing process, there still may be substantial complexities in applying those effluent limitations to the individual plant. EPA is in the main, although not exclusively as NRDC contends in this petition it must, adopting its §301 effluent limitations by carefully thought out classes and categories.* First, the permitting authority must determine which category the applicant

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*As discussed below EPA is making many sub-categories for establishing effluent limitations and drawing many fine lines.

falls into. Knowledge of the exact process or processes the permittee uses may also be required, because in many industry categories there are several different processes used to produce the same product, each of which may produce different types and levels of pollutants and as to which the effluent limitations may differ. Next, since the effluent limitations are almost always expressed in measures of weight of pollutant per unit of productions so as to allow different amounts of discharge for different size plants, the quantity of production of the plant must be determined. This information is sometimes claimed by prospective permittees as a trade secret and must be obtained by the permitting authority under legal authority with appropriate guarantees of confidentiallty. The process of translating the technology based effluent limitations into specific permit conditions for a large plant, producing several products at different levels of production at different times may be especially complex.

The translation of the toxic substance effluent limitations, in the process of promulgation pursuant to §307 of the Act, into specific permit conditions may be easier; but even they, as presently proposed, are based on a formula related to receiving water type and flow. Thus, toxic substance permit conditions will likely require calculation.

The translation of ambient water quality standard based effluent limitations (§§302 and 303) into specific permit

conditions is likewise complex. In addition, it is perfectly possible and will undoubtedly occur with some frequency that more than one of the different types of effluent limitations will apply to a given permittee simultaneously.

In addition to translating the effluent limitations into specific permit conditions, the permit must contain requirements for the monitoring and reporting by the permittee of the contents of his discharges as required by §308 of the Act. The establishment of this requirement may itself be complex with regard to a point source with a large and varied discharge of pollutants.

The computation of the specific permit conditions and monitoring and reporting requirements and incorporation of them in an NPDES permit is central to the control and enforcement strategy Congress intended in the Act. Once final, after the opportunity for judicial review, the permit conditions are directly enforceable by the Administrator under §309 of the Act, by the state or interstate agency participating in NPDES under their enforcement law required as a condition of participation, and by injured citizens under the citizen suit provisions of §505 of the Act, all without any of the complex showings and computations necessary in the absence of a permit.

Not only is the legal standard to be enforced established clearly and simply in the permit in terms of each particular permittee, but the reports required by the self-monitoring

conditions in the NPDES permit are publicly available. This makes enforcement enormously more practicable and efficient for government agencies and for private citizens under the citizen suit provisions.

The Contested Regulations

The regulations at issue were adopted pursuant to §§301*, 304 and 306. They are effluent limitations, effluent limitations guidelines and standards of performance. The regulations grew out of one lengthy and detailed rulemaking process.

First, EPA gave Advance Notice of Public Review Procedures** of its rulemaking process. EPA methodology is described in Part 2, and it is fair to characterize it as extraordinarily thorough. In broadest brush, it involves:

(1) an analysis of each large industry category (i.e., non-ferrous metals) to determine whether differences in products, processes, age and size of plant and other factors require the development of separate limitations for different segments or sub-categories of the main point source category;

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*Intervenors dispute that the contested regulations were adopted pursuant to §301.

**38 Fed. Reg. 21202 (Aug. 6, 1973). The Advance Notice is set out in the Appendix as the first regulation.

(2) a full technical and economic analysis of the selected categories or sub-categories, usually by independent consultants in cooperation with EPA personnel. The affected industries were deeply involved in this stage as all others;

(3) comments by the public on the consultants' technical and economic report;

(4) proposal of regulations by EPA based on the foregoing, closely followed by publication of a draft development document and an independent economic analysis analyzing a broad range of control technologies and providing the technical and economic basis for the proposed regulations;

(5) more public comment and in some cases hearings on the proposed regulations;

(6) final regulations followed by publication of a final development document.

It is important to understand that the consultants' reports and the development documents are formidable documents and are themselves an integral part of the final rules. It is in the development documents that the various control technologies and factors of product, process, age and engineering differences are identified and analyzed.

From this rulemaking process came regulations which are §301 effluent limitations, §304 effluent limitations guidelines (in part underlying §301 effluent limitations and in part

providing the description of the various types of control technology necessary to achieve §301 effluent limitations) and §306 standards of performance.

The regulations at issue, which are reproduced in the Appendix, are:

(a) Part 412, Feedlots Point Source Category, promulgated January 31, 1974, 39 Fed. Reg. 5703 (1974);

(b) Part 426, Glass Manufacturing Point Source Category, promulgated January 31, 1974, 39 Fed. Reg. 5711 (1974);

(c) Part 422, Phosphate Manufacturing Point Source Category, promulgated January 31, 1974, 39 Fed. Reg. 6579 (1974);

(d) Part 411, Cement Manufacturing Point Source Category, promulgated January 31, 1974, 39 Fed. Reg. 6589 (1974);

(e) Part 428, Rubber Manufacturing Point Source Category, promulgated February 8, 1974, 39 Fed. Reg. 6660 (1974);

(f) Part 424, Ferroalloy Manufacturing Point Source Category, promulgated February 8, 1974, 39 Fed. Reg. 6805 (1974);

(g) Part 427, Asbestos Manufacturing Point Source Category, promulgated February 15, 1974, 39 Fed. Reg. 7525 (1974);

(h) Part 432, Meat Product and Rendering Processing Point Source Category, promulgated February 15, 1974, 39 Fed. Reg. 7894 (1974);

(i) Part 421, Nonferrous Metals Manufacturing Point Source Category, promulgated March 27, 1974, 39 Fed. Reg. 12822 (1974).

Although none of these regulations when initially proposed contained such a clause, each final regulation contained

the identical clause:

> In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations.

It is this variance clause, which can only operate in the permit writing process, that petitioner contends violates the Congressional mandate that §301 effluent limitations be prepared by classes and categories in a rulemaking process.

Summary of Argument

Point 1: The Court has jurisdiction pursuant to §509(b)(1)(E) of the Act over this petition seeking review of §301(b) effluent limitations. As a matter of fact the contested regulations are §301(b) effluent limitations promulgated pursuant to a proper interpretation of the Act and within the procedural requirements of the Administrative Procedure Act.

The Act at least allows the approach EPA has taken of three legally discrete, although practically intertwined, levels of regulations: §304(b) effluent limitations guidelines, §301(b) effluent limitations and §306 standards of performance. A fair reading of the Act and its legislative history and the drafters' desire for nationwide uniformity of standard supports this conclusion. No legislative history or purpose justifies the Byzantine interpretation intervenors urge.

Point II: Congress intended that §301(b) effluent limitations account for diversity of point sources by the process of determining sub-categories of larger industry classes and categories and then adopting within the rulemaking process separate effluent limitations for each. The contested variance clause which appears in each regulation purports to allow a plant by plant variance from the nationwide effluent limitations

in the permit writing process. The variance clause is unlawful and EPA's proper remedy for any instance of the inapplicability of its effluent limitations is through further rulemaking.

POINT I

THIS COURT HAS JURISDICTION PURSUANT TO §509(b)(1)(E) OF THE ACT OVER THIS PETITION SEEKING REVIEW OF NINE EFFLUENT LIMITATIONS PROMULGATED BY THE ADMINISTRATOR PURSUANT TO §301 OF THE ACT.

In petitioner's conception the jurisdiction of this Court is quite simple and straight forward. Jurisdiction is based on §509(b)(1)(E) of the Act which provides in pertinent part:

> "Review of the Administrator's action ... (E) in approving or promulgating any effluent limitations or other limitation under section 301, 302 or 306 ... may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person."

Petitioners read the regulations on their face as being three things: §301 effluent limitations, §304 effluent limitations guidelines and §306 standards of performance. Of the two portions reviewable in this Court -- §301 effluent limitations and §306 standards of performance -- petitioner seeks review of a portion of each of nine §301 effluent limitations.*

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* While these three parts of the subject regulations are legally different, they in fact arose out of the same rulemaking described above. The basis for them is the same massive and detailed analysis of control technology and economics. Section 301 effluent limitations and §304 effluent limitations guidelines are especially closely intertwined as discussed below in Point II.

From published material, it is apparent that EPA is in accord with petitioner's position on jurisdiction, although it is perfectly clear that agreement cannot confer jurisdiction. Intervenors dispute the straight forward interpretation of §509 of the Act based on a fundamental and radically different interpretation of the Act -- principally §§301, 304 and 402 -- which, if adopted by this Court, leads to a conclusion that this Court has no jurisdiction.

The jurisdictional dispute finds petitioner and EPA in agreement with each other and together in disagreement with intervenors. Because it is the most fundamental dispute in the proceeding, and relates to the jurisdiction of the Court, petitioner addresses it first.

To rebut EPA's and petitioner's interpretation of §509 of the Act, upon which petitioner believes jurisdiction is properly based, intervenors make three arguments:*

(1) §509 does not provide for review of §304 effluent limitations guidelines in the Courts of Appeals;

(2) the Act prohibits the promulgation by regulation of §301(b) effluent limitations, but rather only contemplates §304(b) effluent limitations guidelines and conditions in §402 permits; and

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* Intervenors chose to file their brief early, apparently computing filing time from the original filing of the Index to the Record rather than the later amended filing. Since petitioner received and studied intervenors' brief, petitioner will deal here with intervenors' arguments.

(3) even if the Act does allow separate §301 effluent limitations, EPA violated the rulemaking procedures of the Administrative Procedure Act in notifying the world only at the last minute that it was proposing and promulgating §301 effluent limitations in addition to the §304 effluent limitations.

On intervenors' first point, petitioner has no disagreement. Section 509 does not provide for review by the Courts of Appeals for §304 effluent limitations guidelines. If that is all EPA did or can do, then this Court does not have jurisdiction over this petition.

Intervenors' second argument is the central interpretive issue and will be discussed at length below.

Intervenors' third argument will be fully briefed by the Department of Justice. Petitioner believes it is appropriate that EPA defend in detail its rulemaking procedure. Petitioner does believe that three facts completely rebut intervenors' argument that notice, both formal and informal, was in any way inadequate: (1) the constant referral at each stage of the rulemaking to §301 as a basis of proposed action; (2) the full debate lead by these same intervenors represented

by the same attorneys before the Effluent Standards and Water Quality Information Advisory Committee established pursuant to §515 of the Act and active within EPA in preparing the regulations at issue; and (3) the uniform approach of EPA throughout the long and detailed rulemaking process of analyzing, proposing and finally promulgating for each industry category or subcategory one set of "numbers" setting the maximum discharge of each pollutant.

While petition does not contest intervenors' right to attack the legality of EPA's approach or specific regulations, petitioner disputes that intervenors or anyone else did not have overwhelming notice, both formal and informal, of what EPA was doing.

The central issue then in intervenors' jurisdictional dispute is their contention that the Act prohibits a three-tiered approach as EPA and petitioner interpret it. EPA's interpretation of the Act that underlies its action in promulgating the contested regulations is that (1) §304(b) requires effluent limitations guidelines; (2) §301(b) <u>at least allows</u> nationwide, uniform effluent limitations and (3) §402 requires the tailoring and adoption for each applicant of various permit conditions, including those setting maxima for each pollutant discharged. The phrase "at least allows" is underscored to emphasize that, while the question of whether EPA is required or only allowed if it chooses to promulgate §301(b) effluent limitations apart

from §304(b) effluent limitations guidelines may be relevant to the dispute between petitioner and EPA, in order to find jurisdiction the Court must only determine that the Act allows EPA to adopt §301(b) effluent limitations and take the three-tiered approach.

Petitioner contends that at least the Act allows EPA to adopt §301(b) effluent limitations. Section 301(b) speaks of effluent limitations. Nationwide, uniform effluent limitations such as EPA has promulgated fall within the definition of the phrase "effluent limitations" in §502(11) of the Act.* Section 501(a) of the Act provides:

> "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act."

Intervenors argue that by the phrase "effluent limitations" in the Act Congress meant not an independent standard or rule but a condition contained in a discharge permit and accuse EPA and petitioner of doing violence to the Congressional intent as to the fundamental structure of the Act. In fact it is intervenors' reading of the Act which is most strained.

Intervenor in effect urges this Court to add a phrase not now contained in §502(11) so that it would read:

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*"Sec. 502(11) The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance."

> "The term 'effluent limitation' means any restriction established by a State or Administrator IN A DISCHARGE PERMIT on quantities, rates and concentrations of, etc..." (Material added in capitals).

That phrase is not contained in §502(11) and should not be added by this Court.

Congress in other sections, most notably §505, of the Act demonstrated clearly that it understood the difference between a nationwide, uniform type of effluent limitations and a permit condition regulating discharges. In that light there is not sufficient ambiguity or question about the meaning of §502(11) to justify the tortuous analysis intervenors attempt to lead the Court to overturn the very basis of EPA action here.

Section 505 establishes the right and procedure for citizen suits seeking enforcement of various provisions of the Act. The right is created in §505(a).* Section 505(f) contains a special definition of the phrase "effluent limitations and standard" used in §505(a). It provides:

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*"Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf --
(1) against any person including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, ..."

> "(f) For purposes of this section, the term 'effluent standard or limitation under this Act' means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under §301 or 302 of this Act; (3) standard of performance under section 306 of this Act; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act; (5) certification under section 401 of this Act; or (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a requirement applicable by reason of section 313 of this Act)." (Emphasis added).

a permit condition. A citizen can enforce either or both pursuant to §505(f)(2). From this and the discussion of §505(f) contained in the House and Senate Reports*, it is abundantly clear that Congress understood the difference between an effluent limitation under §301 and a permit condition regulating discharges under §402.

In §309(a)(3) Congress authorizes the Administrator to enforce violations of §301 separately from authority to enforce §402 permit conditions or limitations.** Moreover,

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* H. Rep. 92-911, 92 Cong., 2d sess., at 134 (1972) (Legis. Hist. 821); S. Rep. 92-414, 92 Cong., 2d sess., at 81-82 (1971) (Legis. Hist. 1499-1500). References to Legis. Hist. are to a handy, two-volume compendium of legislative history of the Act prepared by the Congressional Research Service of the Library of Congress for the Senate Public Works Committee entitled "A Legislative History of the Water Pollution Control Act Amendments of 1972" (Committee Print 93-1, Jan. 1973).

** In the Senate Committee Report, it is made clear that Congress understood this distinction.

> "The distinction between enforcement for violation of an unlawful discharge and enforcement for operating without a required permit under Section 402 is intended to cause the Administrator to act expeditiously to issue permits under Section 402." S. Rep. 92-414, 92 Cong., 1st sess. 64 (1971) (Legis. Hist. 1482)

§309(a)(3) by its drafting equates §301 with §306 and §307 which demonstrates that Congress had in mind the enforcement of §301 effluent limitations and not merely the prohibition of §301(a).

The usage of the phrase "effluent limitations" in §§301 and 304 and their legislative history* is also evidence of a Congressional understanding that nationwide, uniform rules and standards adopted by regulation are proper. It is the "effluent limitations" which are to be achieved by 1977 and 1983 respectively, not as intervenors imply the application of specific technology.**

Moreover, in §301(d) and (e) Congress stated:

> "(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.
>
> "(e) Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act."

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* The Legislative History is discussed in Point II below at length.

** At page 7 of their Brief, for instance, intervenors use the phrase "Section 301 provides that these technological objectives.." The objectives of §301(b) are, however, effluent limitations not technology, although the effluent limitations are based on the technology identified pursuant to §304.

That usage of the phrase "effluent limitation" certainly is most consistent with an interpretation that Congress contemplated §301 effluent limitations be "established" separate from §304(b) effluent limitations guidelines and §402 permit conditions. No doubt a strained interpretation of these subsections can be made to incorporate them into intervenors' cosmology. The question is why strain when they are most fairly read to support exactly what EPA has done. If one can speculate about intervenors' motives, as they rather condescendingly refuse to do for EPA, intervenors would have this Court adopt their strained interpretation to achieve results more "flexible" (read "able to be bent to the will of intervenors") for intervenors' enormous and frequently serious discharges.

Intervenors make much of the reference in the definition of effluent limitations in §502(11) to a restriction established by a state. In attempting to press this argument as they do, intervenors expose most clearly an unstated premise of the conclusion they urge upon the Court. Intervenors must convince the Court that the definition of effluent limitations in §502 excludes nationwide, uniform rules or standards under §301. In other words, for intervenors to prevail this Court must determine that §502(11) includes only permit conditions. On the other hand, it is sufficient to sustain jurisdiction under

§509 that §502(11) include, as petitioners contend, both nationwide §301 regulations and permit conditions applying those §301 effluent limitations to a particular permittee. If the definition in §502(11) includes both, then intervenors' mighty straining is beside the point.

Moreover, the interpretation that §502(11) includes both §301 effluent limitations and §402 permit conditions applying those effluent limitations to a particular permittee explains the reference to "approving" effluent limitations contained in §509(b)(1)(E). As intervenors point out the Administrator under §402(d)(2) may, if he has not waived his power under §402(d)(3), disapprove a state issued permit. But the inclusion of state issued permit conditions within the definition of effluent limitations does not negate the clear fit of separate §301 effluent limitations within the definition of §502(11).

The legislative history, some of which intervenors cite, is more fairly read to support EPA's and petitioners' interpretation of the Act.

There is no doubt that the foundation of the Act's effectiveness is the triumverate of nationwide, uniform effluent limitations established under §§301 and 304 together, the translation of those effluent limitations into specific permit conditions, primarily through the National Pollutant Discharge

Elimination System established in §402 and strong enforcement, by the federal government (under §309 of the Act), the state (under the state law required by §402(b)(7) of the Act as a condition of becoming the permitting authority) and affected private citizens (under §505 of the Act). At several places the Congressional committees and individual legislators expressed that the key to the effluent limitations, upon which the permit program was built, was §301 and not as intervenors contend §304.

Thus, it is in a discussion of §301, not §304 that the Senate Committee stated:

> "The program proposed by this section [§301] will be implemented through permits issued in Section 402." S. Rep. 92-414, 92 Cong. 1st sess., at 42 (1971).

When the Senate Committee discussed §304 it stated as intervenors cited at page 8 of their Brief:

> "The information on the technology of control developed under section 304 should facilitate the administration of this system." S. Rep. 92-414, supra, at 72.

Thus, it is under §301 that the rule or standard will be supplied -- effluent limitations -- and information developed under §304 will perform the lesser duty of facilitating the administration of this system.

EPA gave extensive testimony and other commentary on the Act at various stages of its development. It is important legislative history and is included as such in the compendium

of legislative history mentioned in the footnote at 23 above. Once again it was in a discussion of §301, not §304, that Mr. Ruckelshaus stated in a l tter to the Office of Management and Budget urging the President not to veto the bill:

> "The key element in the Administration's proposal for this legislation was the concept of effluent limitations, as distinguished from simply pursuing water quality standards objectives. The Conference bill fully incorporates as its central regulatory point the Administration's proposal concerning effluent limitations in terms of industrial categories and groups ultimately applicable to individual dischargers through a permit system." 118 Cong. Rec. S.18451 (daily ed., 10/17/72) Legis. Hist. at 149.

Certainly that language can only be fairly interpreted to support §301 effluent limitations separate from §304 effluent limitations guidelines and §402 permit conditions.*

At bottom, intervenors' conception of the Act as calling for §304(b) effluent limitations guidelines and §402 permit conditions without the intermediate step of §301 effluent limitations is based on and must be judged on a functional analysis. Does it achieve what Congress intended? The arguments from the face of the Act and its legislative history do not end the analysis.

Congress wanted uniformity of standard and regulations nationwide to end the patchwork of different state water pollution

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* Further support is found in a statement by Senator Nelson during the debate on the Senate version of the Act where he describes §402 as "implementing" §301 and other sections, not including §304. Cong. Rec. S.38841 (daily ed. 11/2/71) Legis. Hist. at 1354.

control efforts. This older scheme in which the states clearly predominated over the federal involvement did not work in part because each state if it became aggressive was subject to the threat of a plant moving to a "friendlier" state.*

Yet Congress recognized that there must be a great deal of care given to the establishment of effluent limitations which would govern discharges from plants with diverse products, diverse processes, and different ages. This concern is expressed in the complicated and thorough process of preparation of effluent limitations guidelines required by §304(b) and the specification in that section of the factors that EPA must take into account in preparing effluent limitations guidelines.

The principal procedure in petitioners' and EPA's conception for dealing with the variety among industrial discharges is the process of categorizing and sub-categorizing discharges in the rulemaking process of adopting both §304 effluent limitations guidelines and §301 effluent limitations.**

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*See, Barry, The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation, 68 Mich. L. Rev. 1103 (May, 1970).

**This is exactly what EPA has done. In §2 of its Advance Notice of Public Review Procedures (38 Fed. Reg. 21202 (8/6/73) -- see Appendix) EPA provided in relevant part:

> "2. EPA's methodology -- (a) Overall approach. The technical studies discussed below and the development of regulations for effluent limitations guidelines and standards of performance are undertaken in the following manner. The point source category is first studied for the purpose of determining whether separate limitations and standards are appropriate for different segments within the category. This analysis includes a determination of whether differences in raw material used, product produced, manufacturing process

EPA's process, unlike intervenors' suggested establishment of permit conditions from some non-specific guidelines, takes place within the rulemaking framework. EPA's approach goes much further in assuring uniformity of effluent limitations among like discharges. The process of standard setting takes place one step removed from the always present plea of polluter for unique (meaning special) treatment when faced with the hard reality of the issuance of strict and enforceable permits.

As described above and as leaps out at the reader of the Index to the Administrative Record, EPA has gone about this process of carefully analyzing each large industry category and then breaking it down into sub-categories of like discharges. Likewise the final effluent limitations promulgated are properly not the strictest available. If EPA has followed the statutory directions, the levels set are based on what may roughly be described as a weighted average of present industry pollution controls.

Thus, the process of sub-categorization and of setting a level for each sub-category below the highest is the establishment of a range of effluent limitations that Congress directed. There is no one overall effluent limitation for the non-ferrous metals industry, for instance.

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* (Cont'd)

employed, age and size of plants, waste water constituents and other factors require development of separate limitations and standards for different segments of the point source category.

Indeed even the aluminum segment of the non-ferrous metals industry is split up into sub-categories -- bauxite, refining, primary aluminum smelting and secondary aluminum smelting. Each of these sub-categories was given detailed and thorough consideration consistent with §§301(b) and 304(b) in the rulemaking here at issue.*

Petitioner believes that this procedure and not intervenors' best accommodates Congress' desire for both uniformity and recognition of diversity. Certainly the Act permits this procedure. That is sufficient to find jurisdiction to test the legality of specific regulations in the Court of Appeals as petitioner does and as petitioner asserts intervenors must do, if they have a gripe.

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* Document 15 of Volume 9 of the Certified Index to the Record is the final development document for bauxite refining (97 pages); Document 16 is for primary smelting (140 pages) and Document 17 is for secondary smelting (129 pages) all within the aluminum segment of the non-ferrous metals category.

POINT II

THE CONTESTED VARIANCE CLAUSE IN EACH §301 EFFLUENT LIMITATION VIOLATES THE CONGRESSIONAL DIRECTION THAT THE RULEMAKING PROCESS OF DETERMINING SUB-CATEGORIES OF INDUSTRY CATEGORIES BE THE ONLY METHOD FOR DEALING WITH THE MAJOR VARIATIONS AMONG DISCHARGERS.

In §§301 and 304 Congress went beyond merely allowing EPA to adopt the rulemaking process of determining sub-categories as a method for dealing with the major differences among dischargers. Congress directed that such process be the exclusive method. Thus, the variance clause by which EPA purports to be able to set special permit conditions based on a vague standard and without the formality of rulemaking is unlawful.

Section 301 and 304 are unusually closely related procedurally. There is no separate time period within which effluent limitations are to be adopted after effluent limitations guidelines are required.* This closer relation between §301 effluent limitations and §304 effluent limitations guidelines reflects a Congressional understanding the effluent limitations and effluent limitations guidelines are for practical, although not legal, purposes inextricably intertwined.

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* This contrasts with the procedure in the Act for pretreatment guidelines and pretreatment standards. Pursuant to §304 of the Act the Administrator must publish pretreatment guidelines within 120 days of enactment of the Act for the pretreatment of pollutants introduced into municipal treatment systems. Sixty days later, within 180 days of the enactment of the Act, the Administrator must publish proposed pretreatment standards for the same discharges.

It is this close relationship and inevitably joint rulemaking process as well as the legislative history that supports the conclusion that the variance clause is unlawful.

Section 301(b) and 304(b) are identically structured. Section 304(b)(1)(A), which corresponds to §301(b)(1)(A) or so-called "Phase I", calls for effluent limitations guidelines which shall

> ... identify, in terms of amounts of constituents and chemical, physical and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources ..." (Emphasis added)

Section 304(b)(2)(A), which corresponds to §301(b)(2)(A) or so-called "Phase II", calls for effluent limitations guidelines also "for classes and categories of point sources".

Section 304(b)(1)(A) and (b)(2)(B), once again corresponding to Phase I and Phase II, directs EPA in the effluent limitations guidelines to

> "Specify factors to be taken into account in determining the control measures and practices to be applicable to point sources ... within such categories and classes." (§304(b)(1)(B))

That subsection then lists the factors which for Phase I include total cost in relation to effluent reduction benefit, age of equipment and facilities and the process employed.

Section 301(b)(2)(A) dealing with Phase II effluent limitations speaks in terms of "categories and classes." Section 301(b)(1)(A) dealing with Phase I effluent limitations does not. As explained below at 37 when analyzing the legislative history this difference in language cannot be interpreted to support different approaches for Phase I and Phase II effluent limitations.

What Congress had in mind when it used the phrase "classes and categories of point sources" is demonstrated in §306, dealing with standards of performance. In §306(b)(1)(A) Congres listed a minimum of 27 such categories for use in establishing §306 standards of performance. But as in the case of standards of performance*, Congress recognized that even the many industrial categories were not adequate to deal with the diversity of dischargers and that within these categories different processes, age, and the other factors listed in §304(b)(1)(B) and (b)(2)(B) must be considered.

The question then becomes how did Congress intend EPA to deal with those variances within the larger industry categories -- by publishing only general guidelines within the broad category and making adjustments in individual permit

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*§306(b)(2) provides:

"The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous)."

writing as intervenors suggest* of by making careful sub-categories and issue nationwide, uniform effluent limitations for each such carefully drawn sub-category within the rule-making process as EPA has done in the main. Thus, the dispute between all the parties is not over whether there are variations among industrial discharges -- there clearly are. Rather the dispute is over the proper regulatory framework for dealing with those variations.

Some of the legislative history is unhelpful on this precise point. The clearest discussion is found in Senator Muskie's explanation to the Senate of the results of the House-Senate conference agreement.

First Senator Muskie points out the relationship between §304 and §301 and supports the existence of §301 effluent limitations by categories and classes.

> "Section 304(b), as agreed to by the Conferees, requires that the Administrator publish regulations which shall provide guidelines for the establishment of the effluent limitations to be echieved by categories and classes of point sources (other than publicly owned treatment works) pursuant to section 301(b) of the Act." 118 Cong. Rec. S.16873 (daily ed. 10/4/72) (Legis. Hist. 171)

Then Senator Muskie points out the factors which must be considered in arriving at Phase I and Phase II effluent

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*It is ominous to note that in their complaint for declaratory judgment raising this same issue in the U. S. District Court for the Western District of Virginia (footnote at 20 of Intervenors' Brief) intervenors assert that §304 effluent limitations guidelines can be used in "the discretion" of the permitting authority. Thus, in intervenors' conception Phase I and Phase II outlined in §301(b) are essentially without any firm or enforceable standard.

limitations within each category or class. Finally Senator Muskie explains how and when these factors are to be taken into account.

> "The Conferees intend that the factors described in section 304(b) be considered only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitations to an individual point source within such a category or class." Id at S.16874.

He then returns to §301, once again emphasizing the close relationship between §§301 and 304, explains the importance of uniformity of §301 effluent limitations, and concludes that the only variance from uniform effluent limitations is contained in §301(c).

Petitioner attaches a great deal of importance to this passage. It is a relatively clear and concise statement of the regulatory scheme contemplated by Congress under §§301 and 304. It supports EPA's approach up to the contested variance clause. Most important is the passage that the variability within a category must be taken into account in the rulemaking and not the permit writing process. Finally, Senator Muskie parts company with EPA and supports petitioner's

contention that the only exception to this "classes and categories" approach is contained in §301(c) -- not in some permit-by-permit variance clause as EPA has promulgated.

Senator Muskie's explicit statement about §301(c) rebuts any argument that the failure to mention classes and categories in §301(b)(1)(A) has any significance. An understanding of §301(c) offers an explanation of why the phrase appears in §301(b)(2)(A) and not §301(b)(1)(A).

As §301 was adopted by the Senate neither subsections used the phrase "classes or categories"; yet the legislative history supports an interpretation that the concept in §304 carried through to §301. The Senate bill defined Phase I as "best practicable" and Phase II as "elimination of discharge". An exception downward could be given for Phase II to the level of "best available".

After extensive fighting in conference, the House version essentially prevailed. Phase I in the final Act is best practicable, while Phase II is best available. The exception clause was given a separate subsection (§301(c)) and a rather vague floor for such an exception set somewhere between best practicable and best available.

The phrase "classes and categories" was added to §301(b)(2)(A) in conference as a part of the above described accomodation between the Senate and House. It was apparently

added to make specific the concept of rulemaking by classes and categories, already implicit in §301(b)(1)(A), in case the exception clause in §301(c) was to be interpreted to change that concept as to §301(b)(2)(A). Thus, Senator Muskie could state that the only exception to §301(b) effluent limitations (both Phase I and Phase II) was to be found in §301(c), which by its terms only operates on Phase II set out in §301(b)(2)(A).

Senator Muskie's conception of the regulatory scheme of §§301 and 304 is repeated in other places in the legislative history. In discussing §301 the Conference Report requires that the economic impact of effluent limitations is to be analyzed, prior to 1977 when the variance procedures of §301(c) can operate in relation to "best available technology" effluent limitation, on the basis of classes and categories and not on a case by case basis.*

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*The Conference Report reads:

> "The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination. However, after July 1, 1977, the owner or operator of a plant may seek relief from the requirement to achieve effluent limitations based on best available technology economically achievable." S. Rep. 92-1236, 92 Cong. 2d Sess. at 121 (1972)(Legis. Hist. 304)

Besides its relevance to the question of the variance clause, petitioner believes that the placement of this discussion under §301 and not §304 and the implication in the passage that effluent limitations apply to classes and categories of point sources provide support for the EPA conclusion that the Act contemplates effluent limitations separate from effluent limitations guidelines.

Senator Muskie and Congressman Jones also explained that the cost-benefit analysis implied in §301(b) and §304(b) was to be made on the basis of a class or category and not on a plant by plant basis.*

Seen in this light then the injunction, stated by Senator Muskie, continuing the passage quoted above at p. 36, that:

> "The Administrator should establish the range of 'best practicable' levels based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category." 118 Cong. Rec. S.16873 (daily ed. 10/4/72) (Legis. Hist. 169)

and:

> "It is assumed, in any event, that 'best practicable technology will be the minimal level of control imposed on all sources within a category or class during the period subsequent to enactment and prior to July 1, 1977." Ibid.

can be seen in their proper perspective. The "range of levels" is to be arrived at within the rulemaking context and is essentially the process of determining sub-categories and defining effluent limitations based on Phase I or Phase II as a minimum within the carefully drawn sub-category.

An example from the regulation at issue clarifies the nature of this process. EPA did not adopt one effluent

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*118 Cong. Rec. S.16873 and H.919 (daily ed. 10/4/72) (Legis. Hist. 170 and 237-238)

limitation for the entire non-ferrous metals industry category. It did not even adopt one effluent limitation for the aluminum sub-category. Rather it adopted three different effluent limitations for the three different "sub-sub-categories" (bauxite refining, primary smelting and secondary smelting) within the aluminum sub-category. This process reflected careful EPA consideration of process differences, engineering difference, cost-benefit analysis and age as outlined in EPA's Advance Notice of Public Review Procedures discussed above at 12 to 14.

The effluent limitations promulgated for each are a minimum. They do not reflect the highest level attainable. Most probably there are individual plants that already achieve higher removal of pollutants. Thus, the range of effluent limitations within the industry category of non-ferrous metals is the many different effluent limitations for sub-categories and the level at which each is set.

Intervenors' conception is difficult to comprehend. Apparently they would have EPA promulgate one standard for the entire non-ferrous metals industry. In and of itself such a standard would be useless because it couldn't account for all the variability even, for instance, within the aluminum sub-category much less within the entire non-ferrous metals category.

Then the effluent limitations guidelines would contain a variety of formula or bases for adjustment, more or (more probably) less specific, for moving from the general numbers to application to a specific point source. This cumbersome scheme is neither contemplated by the Act nor likely to achieve the desired uniformity as between point sources, although petitioner grants it would achieve the maximum flexibility as well as the maximum chaos.

The impropriety of the variance clause itself is highlighted by the example of the aluminum effluent limitations. EPA properly drew the classes and categories finely. There are only 9 plants in the bauxite refining sub-category nationwide.* EPA or its consultants actually visited 8 of these 9 plants in addition to other research and analysis.** Surely Congress did not intend for a variance from effluent limitations so finely drawn.

EPA's approach is proper as far as it went. It must be made to complete that process by striking the contested

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*Table I, p. 14, Development Document for Proposed Effluent Limitations Guidelines and New Source Performance Standards for the Bauxite Refining Subcategory of the Aluminum Segment of the Non-ferrous Metals Manufacturing Point Source Category (October, 1973) [Item 5, Volume 9, certified Index to the Record].

**Id, at 12.

variance clauses. If its effluent limitations are not aimed at sub-categories finely enough drawn, EPA's proper course is to reopen the rulemaking process.

Seen in its proper perspective as a dispute over when and how in setting the discharge standards of the Act EPA is to deal with variability among point sources, intervenors' arguments in Point II of their brief are nothing more than a reprise of their main argument about the structure of the Act. Some of the points made require response.

Contrary to intervenors' implication, the Development Documents contain extensive and detailed analysis of various technologies and their engineering implications. Those Development Documents are a part of the rulemaking and constitute the main portion of the §304(b) effluent limitations guidelines.

The implication of sub-point D of Point II of intervenors' brief is entirely false that by providing for states to become the §402 permitting authority Congress meant for substantial state control over the central and critical standards of the Act. This is exactly the opposite of what Congress meant to accomplish. It is the Administrator that sets every standard in the Act, other than §303 ambient water quality standards.

By this argument intervenor exposes the fundamental practical flaw in their position. If their approach is adopted, it is likely that the responsibility of standard setting for

existing discharges will ship inevitably from the Administrator to the states.

CONCLUSION

This Court should sustain its jurisdiction over this petition and set aside the variance clause in each contested regulation as unlawful.

Respectfully submitted,

RICHARD M. HALL
ANGUS MACBETH
Attorneys for Petitioner

United States Court of Appeals

FOR THE SECOND CIRCUIT

No.

AFFIDAVIT OF SERVICE BY MAIL

John White, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 297 Sumpter Street Brooklyn, New York 11233

That on the 26th day of June 1974, deponent served the within 2 Appendix for Petitioner upon Robert C, Barnard, Esq. - 1250 Connecticut Avenue N.W. Washington, D. C. 20036 & Wallace H. Johnson, Dept. of Justice - Washington, D.C.20530

Attorney(s) for the Petitioner in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me, John White

This 26th day of June 1974

William R. McKaigney

WILLIAM R. McKAIGNEY
Notary Public, State of New York
No. 41-7846700
Qualified in Queens County
Certificate filed in Kings County
Commission Expires March 30, 1976